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IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1981

BILL M. SILKWOOD, Administrator of the Estate of Karen G. Silkwood, Deceased,

Appellant,

v.

KERR-MCGEE CORPORATION, a Delaware Corporation and KERR-MCGEE NUCLEAR CORPORATION, a Delaware Corporation,

Appellees.

ON APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF OF THE STATE OF MINNESOTA AS AMICUS CURIAE

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I. STATEMENT OF INTEREST OF MINNESOTA

Pursuant to Rule 36 of the Rules of the Supreme Court of the United States, the State of Minnesota (hereinafter "Minnesota") by its Attorney General hereby files its brief as amicus curiae in the above-entitled matter.

Minnesota has an interest in the preemption issue raised in this litigation by the holding of the United States Court of Appeals for the Tenth Circuit that Oklahoma's punitive damages statute is preempted by federal congressional action and therefore unconstitutional under the Supremacy Clause of the United States Constitution.

Minnesota's interest arises from the fact that it has a statute which allows Minnesota courts to award punitive damages in civil actions where the court has found that the defendant's acts show a willful indifference to the rights or safety of others. Minn. Stat. §549.20, subd. 1 (1980) provides:

> Punitive damages shall be allowed in civil actions only upon clear and convincing evidence that the acts of the defendant show a willful indifference to the rights or safety of others.

Subdivision 3 of the statute sets forth the factors to be considered by the court in such an award. That subdivision states:

> Any award of punitive damages shall be measured by those factors which justly bear upon the purpose of punitive damages, including the seriousness of hazard to the public arising from the defendant's misconduct, the profitability of the misconduct to the defendant, the duration of the misconduct and any concealment of it, the degree of the defendant's awareness of the hazard and of its excessiveness, the attitude and conduct of the defendant upon discovery of the misconduct, the number and level of employees involved in causing or concealing the misconduct, the financial condition of the defendant, and the total effect of other punishment likely to be imposed upon the defendant as a result of the misconduct, including compensatory and punitive damage awards to the plaintiff and other similarly situated persons, and the severity of any criminal penalty to which the defendant may be subject.

Minnesota's statute was enacted in 1978. It sets forth standards for the award of punitive damages which parallel those of the common law. Minnesota-Iowa Television Company v. Watonwan T.V. Improvement

Association, 294 N.W.2d 297, 311 (Minn. 1980). It has been held that this statute does not apply to contract actions (id.), but it presumably applies to all tort actions.

The court of appeals' extremely broad interpretation of the doctrine of preemption, if upheld by this Court, would create a precedent which would have a negative impact upon Minnesota if in the future a challenge were brought against Minn. Stat. §549.20 (1980) in a case where the tort involves a radiation injury rather than any other type of injury. Thus, Minnesota has an interest in the precedent this Court's decision in this case may establish with respect to the validity of Minn. Stat. §549.20 as applied in certain tort cases.

Minnesota also has an historical interest in the issue of preemption of state

laws as they relate to nuclear power. Minnesota was a party in the case of Northern States Power Co. v. Minnesota, 447 F.2d 1143 (8th Cir. 1971), aff'd mem., 405 U.S. 1035 (1972), upon which the court of appeals relied in striking down the application of Oklahoma's punitive damages in this case. Minnesota's concern with nuclear power dates back to the late 1960's and has continued up to the present.

II. STATEMENT OF THE CASE

The statement of the case which follows sets forth only those facts which are relevant to the issue addressed by Minnesota in the remainder of this brief.

Plaintiff Bill M. Silkwood brought suit in federal district court against Kerr-McGee Corporation and Kerr-McGee Nuclear Corporation on behalf of the estate of Karen G. Silkwood for damages caused through exposure to radiation suffered by

the decedent as a consequence of plutonium escaping a nuclear fuel processing plant operated by defendants. Following the jury trial, the district court awarded to plaintiff actual damages in the amount of $505,000. Pursuant to 23 Okla. Stat. §9 (1971), the district court also awarded punitive damages in the amount of $10,000,000. 1/

On appeal the Court of Appeals for the Tenth Circuit reversed the district court on its award of punitive damages. Silkwood v. Kerr-McGee Corp., 667 F.2d 908 (10th Cir. 1981). The court examined the language and the legislative history of the Price-Anderson Act, 71 Stat. 576 (codified in scattered sections of 42 U.S.C.) and concluded that, for nuclear incidents below

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1/ The opinion of the district court denying defendant's post-trial motions is reported in Silkwood v. Kerr-McGee Corp., 485 F.Supp. 566 (W.D. Okla. 1979).

the level of an extraordinary nuclear occurrence, Congress intended that the rules of tort law of the state in which the injury occurred still apply. 667 F.2d at 921. The court, however, found no express mention of punitive damages in the Price-Anderson Act or its legislative history. The court stated:

> References in the Price-Anderson Act that state law may determine tort liability may be read to permit punitive as well as compensatory damages in states like Oklahoma which permit them.

667 F.2d at 922. The court also found, however, that the Act implicitly assumes that for extraordinary nuclear occurrences, only compensatory damages will be awarded. Id. The court apparently found the result in this case unclear under the Act because it made no conclusion as to whether the Act did or did not allow punitive damages to be awarded under state tort law.

The court resolved the doubt created by the Price-Anderson Act by construing the Atomic Energy Act of 1954, 42 U.S.C. §§2011 et seq., particularly section 2021, as preempting a judicial award of punitive damages under state law as punishment for bad practices or to deter future practices involving exposure to radiation. The court stated:

> We cannot read that case [Northern States Power Co. v. Minnesota, 447 F.2d 1143 (8th Cir. 1971), aff'd mem., 405 U.S. 1035 (1972)] and Train [Train v. Colorado Public Interest Research Group, 426 U.S. 1 (1976)] other than as requiring us to hold invalid any state action that competes substantially with the AEC (NRC) in its regulation of radiation hazards associated with plants handling nuclear material.

667 F.2d at 923. The court found the punitive damages award to be "no less intrusive than direct legislative acts of the state." It held 23 Okla. §9 (1971) to be preempted as applied to radiation injuries.

The appellants seek the Court's review of this case and reversal of the Tenth Circuit's holding that Oklahoma's punitive damages is preempted under the Supremacy Clause of the United States Constitution.

IV. SUMMARY OF ARGUMENT

A state's interest in fashioning its own tort remedies is paramount to any federal interest unless there is a conflict with federal law. State punitive damages statutes as applied to tort actions involving radiation injuries do not conflict with federal law and are therefore not preempted as applied to such tort actions.

V. ARGUMENT

STATE PUNITIVE DAMAGES LAWS ARE NOT FEDERALLY PREEMPTED AS APPLIED TO TORT ACTIONS BROUGHT FOR RADIATION INJURIES

The creation of remedies for tort actions is a traditional state power. This Court has recently recognized that a state's interest in fashioning its own

tort laws is paramount to any federal interest unless there is a conflict with federal law. In Martinez v. California, 444 U.S. 277 (1980) the Court upheld against constitutional attack a California statute which provided an immunity defense to potential state tort law liability, stating:

> Even if one characterizes the immunity defense as a statutory deprivation, it would remain true that the State's interest in fashioning its own rules of tort law is paramount to any federal interest, except perhaps an interest in protecting the individual from state action that is wholly arbitrary or irrational.

444 U.S. at 282. The court noted, however, that "when state law creates a cause of action, the State is free to define the defenses to that claim, . . . unless, of course, the state rule is in conflict with federal law." Id., n.5, quoting Ferri v. Ackerman, 444 U.S. 193, 198 (1979).

Punitive damages laws of Oklahoma and other states do not conflict with federal

law and are therefore valid. The court of appeals applied an incorrect standard to invalidate the Oklahoma statute. Therefore this Court should reverse the decision below.

A. There is No Conflict Between Federal Law and the Application of State Punitive Damages Law to a Case Involving Radiation Injury.

This Court has in the past faced the question as to what constitutes a conflict between federal and state law. The conflict may either be created by express language in the federal law or may arise by implication. See Ray v. Atlantic Richfield Co., 435 U.S. 151, 157 (1978).

In cases where there is no express language in the federal law the Court has used two tests to identify conflicts. In Florida Lime and Avocado Growers v. Paul, 373 U.S. 132, 142-43 (1963) the Court stated that a conflict will be found "where

compliance with both federal and state regulations is a physical impossibility." A conflict will similarly be found where the state law "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." Hines v. Davidowitz, 312 U.S. 52, 67 (1941). However, there is a strong presumption in favor of upholding the validity of the state law. Ray v. Atlantic Richfield Co., 435 U.S. 151, 157 (1978). Courts should not seek out conflicts where they do not clearly exist. Huron v. Portland Cement Co. v. City of Detroit, 362 U.S. 440, 446 (1960).

The two bodies of law with which a state punitive damages statute could conceivably conflict are the Price-Anderson Act, 71 Stat. 576 (codified in scattered sections of 42 U.S.C.) and the Atomic Energy Act, 42 U.S.C. §§2011 et seq. The Oklahoma statute conflicts with neither of these.

As previously discussed at 6-7, the court of appeals concedes that for nuclear injuries below the level of an extraordinary nuclear occurrence the Price-Anderson Act provides that state tort rules apply. The court of appeals also concedes that references in the Act itself may be read to permit punitive damages as well as compensatory damages. Therefore there is clearly no conflict between the Price-Anderson Act and state punitive damages statute.

The Atomic Energy Act, 42 U.S.C. §2011 et seq., contains no express language under which state punitive damages laws conflict because the Act contains no provision for awards of damages to private individuals, either compensatory or punitive. See Marshall v. Consumers Power Co., 65 Mich. App. 237, 237 N.W. 2d 266 (1975). The Act and its legislative history contain no

evidence of a direct intention of Congress to preempt any part of state tort law with respect to radiation injuries.

State punitive damages laws also fail to conflict with federal law because they do not create a situation where compliance with both federal and state law is a physical impossibility. Further, such laws do not stand as an obstacle to the accomplishment and execution of the purposes and objectives of Congress.

Compliance with federal law by a person handling radioactive materials is clearly possible without automatically creating liability under a state punitive damages law. In Minnesota, for example, punitive damages may only be awarded where there is "clear and convincing evidence that the acts of the defendant show a willful indifference to the rights of others." Minn. Stat. §549.20 (1980). The Oklahoma

law in question permits the award of punitive damages where fraud, oppression, gross negligence or malice are present or where there is a reckless, willful or wanton disregard for the rights of others. See, e.g., White B. K. Trucking Co., Inc., 405 F.Supp. 1068-69 (W.D. Okla. 1975). There could be no conflict with the Atomic Energy Act and the regulations promulgated thereunder unless it could be shown that Congress intended to compel persons handling radioactive materials to do so in a manner showing a willful or wanton indifference to the rights of others or in a manner that is fraudulent, oppressive, grossly negligent, malicious or reckless. Not even the most enthusiastic proponents of nuclear power would dare to make a claim that such a result is intended by Congress.

The imposition of liability for punitive damages on a defendant who meets

the standards described above does not stand as an obstacle to the accomplishment and execution of the purposes and objectives of Congress. The Atomic Energy Act sets up the structure under which private industry may possess and use radioactive materials, but it does not evidence an intent that private industry should be allowed to handle those materials so as to inflict intentional or reckless injury. As stated by the district court which awarded punitive damages in the instant case:

> Surely defendants would not argue that punitive damages would be inappropriate if a nuclear licensee knew of the time and manner of the plutonium's escape, but did nothing to prevent it because the regulations did not require it. Similarly, if a licensee were aware of defects within its facility that would render likely repeated exposures of employees to plutonium, but did nothing to correct it, . . . punitive damages might be considered regardless whether government regulations required those changes to be made.

Silkwood v. Kerr-McGee Corp., 485 F. Supp. 566, 584 (W.D. Okla. 1979).

An important part of the mission of the Nuclear Regulatory Commission is to protect the health and safety of the public. 42 U.S.C. §2012(d) provides:

> The processing and utilization of source, byproduct, and special nuclear material must be regulated in the national interest in order to provide for the common defense and security and to protect the health and safety of the public.

(Emphasis supplied.) The imposition of penalties to punish a licensee for intentional or reckless infliction of injury does not frustrate the intent of Congress but rather is in furtherance of the same goal. Therefore state punitive damages statutes do not conflict with federal regulation.

B. The Court of Appeals Erred in Finding the Oklahoma Statute to be Preempted on the Grounds that it "Substantially Competes With" and "Intrudes Upon" Federal Regulation.

In striking down the Oklahoma punitive damages statute as applied to radiation

injury the court of appeals applied the wrong standard. The court did not specifically find that the Oklahoma punitive damages law conflicted with federal law. Rather, the court found that the Oklahoma law "substantially competes with" federal law. 667 F.2d at 923. The court found that awarding damages to punish bad practices and deter future bad practices "intrudes upon" the Nuclear Regulatory Commission's regulatory functions under the Atomic Energy Act, 42 U.S.C. §§2011 et seq.

The court of appeals has failed to recognize the state's paramount interest in fashioning its own tort remedies and has struck down a state tort law on grounds that are inconsistent with the test enunciated in Martinez v. California, supra, which requires that there be a conflict between the federal law and the state law before the state law falls. Since the court could not

find an actual conflict between the Oklahoma statute and federal law, it was obliged to uphold its validity. Therefore the court of appeals' decision should be reversed.

V. CONCLUSION

Based on the foregoing, the State of Minnesota by its Attorney General respectfully requests the Court to reverse the holding of the United States Court of Appeals for the Tenth Circuit declaring Oklahoma's punitive damages statute preempted by federal law as applied to radiation injuries.

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